Supreme Court, U.S.
FILED

No. _____ 09-884 JAN 21 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

IN THE MATTER OF J.B.L.,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Eleventh Court Of Appeals Of Texas

PETITION FOR WRIT OF CERTIORARI

JAY M. WRIGHT
Southern District of Texas ID No. 5927
Texas Bar No. 22041800
204 West Davis Street
Conroe, Texas 77301
Telephone: 936-494-2462
Telecopier: 936-494-1976
jaywrightatty@hotmail.com
Attorney for Petitioner, J.B.L.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the Texas determinate sentencing statute (Section 53.045 in conjunction with Section 54.04(d)(3), et seq.) violate the "Due Process" Clause of the Fifth Amendment to the United States Constitution by increasing the maximum punishment to which Petitioner was subjected while denying Petitioner the right to present the enhancement issue to the jury for consideration beyond a reasonable doubt as required by the holding in *Apprendi v. New Jersey*?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the Supreme Court of Texas, the Eleventh Court of Appeals for the State of Texas, and the Montgomery County Court-at-Law Number One of Montgomery County, Texas, which was the trial court.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties to the Proceedings Below	ii
Table of Contents	iii
Table of Authorities	v
Petition for Writ of Certiorari	1
Opinion Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Nature of the Case	2
The Course of Proceedings	4
Relevant Facts	6
The Rulings Below	7
Reasons for Granting the Writ	8
Conclusion	15

Appendix:

Opinion of the Eleventh Court of Appeals of Texas	App. 1
Dispositional Order of Commitment to the Texas Youth Commission	App. 13

TABLE OF CONTENTS – Continued

Page

Dispositional Order of Transfer to the Institutional Division of the Texas Department of Criminal Justice.....App. 16

Denial of Petition For Review by the Texas Supreme Court .....App. 18

Texas Family Code Sections 53.045 and 54, et seq.....App. 19

Trial Jury Charge .....App. 33

Grand Jury Approval of Juvenile Court Petition .....App. 40

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000)....*passim*

In Re Winship, 397 U.S. 358 (1970).....10

STATUTES AND RULES

Tex. Fam. Code Ann., Article 53.045(a) and 54.04(d)(3)(A)(ii), V.T.C.A. (Vernon's 2001) ....*passim*

Tex. Fam. Code Ann., Article 54.04(d)(1), V.T.C.A. (Vernon's 2001).....6, 11, 13

Tex. Fam. Code Ann., Article 54.11(d) and (k), V.T.C.A. (Vernon's 2001).....13

28 U.S.C.A. Section 1257(a) 2

CONSTITUTIONS CITED

Fifth Amendment, United States Constitution, U.S.C.A. 2, 3, 4, 8, 13

Sixth Amendment, United States Constitution, U.S.C.A. 2, 8, 13

OTPER AUTHORITIES

4 W. Blackstone, Commentaries on the Laws of England 343 (1769).....12

PETITION FOR WRIT OF CERTIORARI

J.B.L., Juvenile-Respondent, Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Texas and the Eleventh Court of Appeals for the State of Texas, entered by the Texas Supreme Court, in case number 09-0445, on October 23, 2009 denying Petition For Review of the judgment and opinion issued by the Eleventh Court of Appeals issued on March 5, 2009, in case number 11-07-00221-CV.

OPINION BELOW

The March 5, 2009, Eleventh Court of Appeals for the State of Texas, whose judgment is sought to be reviewed, is not published and is found under Eleventh Court of Appeals Docket Number 11-07-00221-CV. A true and correct copy is set forth at App. 1. A Petition for Review was filed in the Texas Supreme Court under Case Number 09-0445, styled "In The Matter of J.B.L." The Petition for Review was denied by the Texas Supreme Court on October 23, 2009, without opinion, a copy of which is set forth at App. 18. Therefore, the 90-day time period in which to file the Petitioner For Writ Of Certiorari is on or before January 21, 2010.

JURISDICTION

The jurisdiction of the Supreme Court arises under 28 U.S.C.A. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional issues of this case involve violations of petitioner's constitutional rights under the "Due Process Clause" of the Fifth Amendment and right to a jury trial provided by the Sixth Amendment, to the United States Constitution.

The relevant statutes are attached in the appendix. App. 19.

STATEMENT OF THE CASE

Nature of the Case

Petitioner pleaded guilty to engaging in delinquent conduct when, at age 16, he participated in the aggravated robbery of a woman, Colleen Coats. While the adult co-defendant held a gun on Ms. Coats and took her purse, containing money and personal property, in the parking lot of a Wal-Mart store, Petitioner drove the "get away" car. Petitioner and the co-defendant had stolen the "get away" car from another person in another county earlier in the day. Petitioner pleaded "true" to the allegation of aggravated robbery and tried the case to the jury for disposition only.

When the case was submitted to the jury for disposition, the trial court refused to allow the jury the option to sentence Petitioner to an indeterminate sentence to the Texas Youth Commission for an indeterminate period of time not to exceed his 19th birthday. Instead, the jury was only allowed to consider the option to sentence Petitioner to a determinate sentence from zero to forty years to the Texas Youth Commission with a possibility of transfer to the Texas Department of Criminal Justice. A copy of the Charge to the Jury is included at App. 33.

Petitioner complained on appeal, among other things, that Tex. Fam. Code Section 53.045(a) [a copy of this Code Section and Section 54.04(d)(3), the indeterminate sentencing provision, is included at App. 19], has resulted in a violation of his due process rights under the United States Supreme Court holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). On March 5, 2009, the court of appeals agreed that Petitioner's case met all of the requirements of the Due Process Clause of the Fifth Amendment requiring a jury determination of the enhanced punishment issue, but affirmed the judgment of the trial court in this case and held that "An opinion on J.B.L.'s due process claims at this time would be wholly advisory." See App. 11. However, the issue is now ripe.

Petitioner was brought back to juvenile court from the Texas Youth Commission and subjected to a

transfer hearing, over the same Due Process violation objection, and ordered transferred to the Texas Department of Criminal Justice Institutional Division to serve the balance of the thirty-year sentence on May 1, 2009 [a true and correct copy of the Dispositional Order Of Transfer To The Institutional Division Of The Texas Department Of Criminal Justice at App. 16]. The transfer hearing was heard to the court only and Petitioner was afforded no right to have a jury determine the increase in punishment, as well as the stigma that goes with an adult felony incarceration, because the Texas Family Code does not allow a trial to a jury in this instance. The determinate sentencing scheme of the Texas Family Code violates Petitioner's Fifth Amendment right to Due Process provided by the United States Constitution as interpreted by the United States Supreme Court in *Apprendi v. New Jersey*, infra.

The Course of Proceedings

1. Petitioner pleaded true to having engaged in delinquent conduct by having committed the offense of aggravated robbery on January 15, 2007. Petitioner was sentenced under the determinate sentencing statute to the Texas Youth Commission for a period not to exceed thirty years with possibility of transfer to the Texas Department of Criminal Justice, Institutional Division.

2. The Judgment of the trial court was rendered by the Honorable Dennis Watson of the County Court at Law Number One of Montgomery County, Texas.

3. The trial court granted a "Dispositional Order Of Commitment To The Texas Youth Commission" sentencing Petitioner to the Texas Youth Commission with the possibility of transfer to the Texas Department of Corrections, Institutional Division, for thirty years. See App. 13.

4. The parties in the Texas Supreme Court, the Eleventh Court of Appeals, and the trial court were: Petitioner/Appellant/Juvenile-Respondent, J.B.L.; and Respondent/Appellee/Petitioner, The State of Texas.

5. The Court of Appeals for the Eleventh District of Texas heard the appeal and rendered a Judgment with Memorandum Opinion. See App. 1.

6. The disposition by the court of appeals was to overrule the point of error and affirm the trial court's judgment. The court further ruled that the issue as to Petitioner's due process claim was not ripe because Petitioner had not yet been transferred to the Texas Department of Corrections. However, Petitioner has now been transferred to the Texas Department of Corrections, Institutional Division, as of May 1, 2009. A true and correct copy of the "Dispositional Order Of Transfer To The Institutional Division Of The Texas Department Of Criminal Justice" is attached at App. 16.

Relevant Facts

On January 15, 2007, Petitioner participated in an aggravated robbery in Montgomery County, and other felony offenses, along with an adult co-defendant, named Kelvin Alexander, which began in Harris County and took place in Montgomery and Walker Counties during the same day. Petitioner was finally captured after a foot-chase and detained in the Montgomery County Juvenile Detention Center.

The prosecuting attorney on the case, the Montgomery County Attorney's Office, filed a Petition to Adjudicate Petitioner as a delinquent which was approved by the Grand Jury of Montgomery County pursuant to Section 53.045 of the Texas Juvenile Justice Code. See App. 19. This action is the equivalent of a Grand Jury Indictment under the determinate sentencing scheme set out in Section 54.04(d)(3)(A) of the Texas Family Code. By filing this case as a determinate sentence case, Petitioner was forever barred from being sentenced by the judge or jury to an indeterminate sentence under Section 54.04(d)(1) through (2) of the Texas Family Code, even though other juvenile delinquents who have engaged in the same conduct (i.e. aggravated robbery) are routinely sentenced to an indeterminate sentence.

At Petitioner's dispositional phase trial, Petitioner entered a plea of true to the allegations of aggravated robbery and proceeded to a disposition hearing with a jury under the determinate sentencing scheme set

forth in Section 53.045 and 54.04(d)(3)(A)(ii) of the Texas Family Code. The jury was not allowed to consider sentencing the Petitioner to an "indeterminate" sentence to the Texas Youth Commission. The jury was only allowed to consider sentencing Petitioner to a term of years not to exceed forty years with the possibility of transfer to the Texas Department of Criminal Justice. The jury sentenced Petitioner to a thirty-year determinate sentence.

On April 24, 2009, Petitioner was returned to juvenile court and was subjected to, over Petitioner's objection, a "transfer or release" hearing which concluded on May 1, 2009. At the conclusion of the hearing, the court, without the right to a jury, ordered Petitioner transferred to the Texas Department of Criminal Justice, Institutional Division, for the balance of the thirty-year sentence. Petitioner will not be eligible for parole until he has completed at least one-half of his sentence for conduct committed while he was a juvenile.

The Rulings Below

Petitioner complained on appeal that Texas Family Code Section 53.045(a), has resulted in a violation of his due process rights under the United States Supreme Court holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because he was subjected to an increase in the minimum punishment for his crime without the right to a determination of such an increase in punishment to be determined by a jury.

On March 5, 2009, the court of appeals agreed that Petitioner's case met all of the requirements of the Due Process Clause of the Fifth Amendment, thus requiring a jury determination of the enhanced punishment issue, but affirmed the judgment of the trial court in this case and held that "An opinion on J.B.L.'s due process claims at this time would be wholly advisory." See App. 11. A Petition For Review was filed with the Texas Supreme Court, under case number 09-0445, but the Petition for Review was denied without opinion on October 23, 2009. App. 18.

REASONS FOR GRANTING THE WRIT

The Texas determinate sentencing statute (Section 53.045 in conjunction with Section 54.04(d)(3), et seq.), as applied in this case, resulted in a violation of the Due Process Clause of the Fifth Amendment to the United States Constitution by increasing the maximum punishment to which Petitioner was subjected, from an indeterminate sentence until age 19 years to a sentence as high as forty years in adult prison, while denying Petitioner the right to present the enhancement issue to the jury for consideration beyond a reasonable doubt as required by the holding in *Apprendi v. New Jersey*.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the United States Supreme Court held:

> . . . under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment,

> any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt (citations omitted here). The Fourteenth Amendment commands the same answer in this case involving a state statute.

Id. at 473-474. Mr. Apprendi had been charged with second-degree possession of a firearm for an unlawful purpose after he fired several shots into the home of an African-American family. After he pleaded guilty to the charge, which carried a sentence of five to ten years in prison, the prosecutor filed a motion to enhance his punishment alleging the shooting was racially motivated. At the time, the New Jersey enhancement statute at issue allowed a trial court, without a jury determination, to increase the maximum punishment based upon a preponderance of evidence of racial bias. Id. at 466-473. Upon review, the United States Supreme Court, in the opinion authored by Justice Stevens, stated:

> "The historic link between verdict and judgment and the consistent limitation on judge's discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone."

Apprendi, Id. at 473-474.

The Court, citing *In Re Winship*, 397 U.S. 358 (1970), provides additional explanation:

> As we made clear in *Winship*, the "reasonable doubt" requirement "has a vital role in our criminal procedure for cogent reasons," 397 U.S. at 363. Prosecution subjects the criminal defendant both to "the 'possibility' that he may lose his liberty upon conviction and . . . the certainty that he would be stigmatized by the conviction." Ibid. We thus require this, among other, procedural protections in order to "provide concrete substance for the presumption of innocence," and to reduce the risk of imposing such deprivations erroneously. Ibid. If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached.

Id. at 474.

The significance of the passage from *Apprendi*, cited above, is its emphasis on the fact that a defendant may be "stigmatized by the conviction." The process by which the Grand Jury "approves" a petition for determinate sentence substantially

increases the stigma associated with Petitioner's activity by changing the consequences of such criminal activity from a confidential, privileged period of juvenile supervision at a facility of the Texas Youth Commission until age 19 into a first degree felony conviction on Petitioner's public, adult record for life with possible continued incarceration in the Texas Department of Criminal Justice to complete up to a forty-year sentence. This small step, pursuant to Section 53.045 and Section 54.04 of the Texas Juvenile Justice Code, is exactly the point at which Petitioner runs the risk that he "may lose his liberty . . . and be stigmatized by the conviction" as an adult without having a jury determine beyond a reasonable doubt that this form of penalty should be imposed.

Petitioner, J.B.L., was seventeen years old at the time of trial. The maximum term of confinement for an indeterminate sentence under Section 54.04(d)(1) would have provided for commitment to the Texas Youth Commission until the age of 19 (i.e. approximately two years). However, because the Grand Jury "approved" the Petition For Determinate Sentence upon probable cause, Petitioner's maximum term of confinement increased to up to 40 years to begin at the Texas Youth Commission with possible transfer to the Texas Department of Criminal Justice pursuant to Section 53.045 of the Juvenile Justice Code. Petitioner was never given the right to have a jury determine beyond a reasonable doubt whether his maximum sentence should be increased from incarceration up to age 19 in the Texas Youth Commission

to up to forty years in adult prison and to convert a private order of confinement for delinquent conduct as a child into a lifetime record as a convicted, first-degree felon.

Petitioner's case is similar to *Apprendi* in that the jury was not allowed to even consider the option of an indeterminate sentence but was required, by the actions of the state, to only consider the determinate sentence. Under *Apprendi*'s holding, the trial jury should have made the determination to increase Petitioner's punishment (and to substantially increase the social stigmatism of being an adult felon) by finding such increased sentence necessary beyond a reasonable doubt. The leap to increase Petitioner's incarceration from up to age 19 all the way, potentially, to age 57 was done by the state's prosecutor taking its petition to the Grand Jury and having the Grand Jury certify only that "probable cause" existed to certify the juvenile eligible to be sentenced to up to forty years.

Justice Stevens pointed out in *Apprendi* that the principles violated are ancient: " . . . trial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours. . . ." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (emphasis added by author). *Apprendi* at 472-473.

On May 1, 2009, after a two day "transfer or release" hearing held by the juvenile court, pursuant to Sections 53.045, 54.04, and Section 54.11(d) and (k) of the Family Code, without a jury, the court ordered Petitioner transferred to the Texas Department of Criminal Justice, Institutional Division to serve the balance of the thirty-year determinate sentence as a first-degree felon adult offender. A copy of the order is attached at App. 16. This procedure was once again objected to by Petitioner because his due process rights were denied by trying this phase of the case without a jury. These provisions of the juvenile statute are just as unconstitutional as applied in this instance to Petitioner as the New Jersey statute was found to be by the Supreme Court. The Court should specifically find that Sections 53.045, 54.04, when taken together with Section 54.11(d) and (k), of the Juvenile Justice Chapter of the Texas Family Code violate a juvenile-respondent's Fifth Amendment right to due process and should be declared unconstitutional.

The fact that Petitioner wasn't even allowed to present evidence and argue, much less request a jury instruction that the jury sentence him to an indeterminate sentence to the Texas Youth Commission, requires a reversal of the disposition for violation of Petitioner's Fifth Amendment due process rights and his Sixth Amendment right to effective counsel. Once the Petitioner was returned to juvenile court and subjected to being incarcerated as an adult and stigmatized with an adult, felony criminal record,

Petitioner had a right to a jury determination at the transfer hearing which was denied by the trial court. The Petitioner must now serve one-half of his time in adult prison before he can even be considered for parole since the offense (aggravated robbery) is listed as an aggravated offense under Section 42.12(3)(g) of the Texas Code of Criminal Procedure. This severe increase in punishment was had without even the right to a jury determination because the determinate sentencing statute does not allow for a jury to make this decision beyond a reasonable doubt before invoking such a harsh penalty for juvenile conduct.

The denial of rights requires a reversal for a new trial as to disposition only. Therefore, the case should be reversed and remanded for a new trial to include an instruction to the jury that it must consider as a possibility an indeterminate sentence beyond a reasonable doubt as a least restrictive sentence for Petitioner. In the alternative, a new trial should be granted as to the transfer or release hearing so that a jury can determine beyond a reasonable doubt whether Petitioner should be subjected to adult incarceration of up to 27 more years for his past juvenile conduct.

CONCLUSION

Based upon the above and foregoing, Petitioner prays that the Court reverse the disposition of the determinate sentence of 30 years assessed by the court for aggravated robbery, that the Court grant a new trial consistent with his due process rights and right to effective counsel, and that the Court grant any such relief to which he may be entitled.

Respectfully submitted,

JAY M. WRIGHT
Texas Bar No. 22041800
Southern District of
Texas ID No. 5927
204 West Davis Street
Conroe, Texas 77301
Telephone: 936-494-2462
Telecopier: 936-494-1976
Attorney for Petitioner, J.B.L.

Opinion filed March 5, 2009

[SEAL]

In The

Eleventh Court of Appeals

No. 11-07-00221-CV

IN THE MATTER OF J.B.L.

On Appeal from County Court at Law

Montgomery County, Texas

Trial Court Cause No. 07-01-00890-JV

MEMORANDUM OPINION

J.B.L.[1] appeals from the adjudication and disposition in a juvenile court action alleging delinquent conduct, namely aggravated robbery. J.B.L. was adjudicated under the determinate sentencing statute.[2] The jury assessed disposition at confinement for thirty years. We affirm.

---

[1] It is noted that J.B.L. is also referred to as J.V.L. in part of the clerk's record. However, his signature reflects J.B.L.

[2] TEX. FAM. CODE ANN. § 54.04 (Vernon 2008).

Background Facts

J.B.L. participated in several crimes in two different counties. J.B.L. and Kelvin Alexander,[3] an older male who lived next door to J.B.L., attempted to carjack Manuel Mundo outside his apartment. Mundo testified that J.B.L. was carrying an object that he believed to be a shotgun. After the failed carjacking attempt, J.B.L. and Alexander approached Gladys Martinez in the same apartment complex and stole her vehicle. Martinez testified that J.B.L. appeared to be carrying a shotgun and yelled at her to give him the keys. Later that same morning, J.B.L. drove Martinez's stolen vehicle to a Wal-Mart on Interstate Highway 45. There, Alexander approached Colleen Coats and pointed a shotgun at her and demanded her money. J.B.L. and Alexander were identified in the Wal-Mart surveillance video.

After leaving Wal-Mart, J.B.L. and Alexander drove to Huntsville. There, they forcibly entered a home and threatened the residents with guns. They stole money and drugs. J.B.L. testified that his gun was not loaded and that Alexander was looking for drugs. J.B.L. and Alexander were eventually spotted

---

[3] In Volumes Three and Four of the Reporter's Record, Alexander's first name is spelled "Kelvin." In the afternoon session of June 12, a different court reporter transcribed the disposition hearing. In Volume Five of the Reporter's Record, Alexander's first name is spelled "Calvin." Alexander did not testify at the disposition hearing, and his name is never spelled out for the court reporter.

driving Martinez's stolen vehicle at a high rate of speed on Interstate Highway 45. Officer Daniel McGrew activated his overhead lights to initiate a traffic stop of the vehicle, but J.B.L. accelerated. When J.B.L. finally pulled over, he jumped out of the vehicle and began running. Officer McGrew gave chase. Two civilians tackled J.B.L. and held him until Officer McGrew arrived. After his arrest, J.B.L. gave a statement and admitted that he was involved in the robbery at Wal-Mart and at the home in Huntsville.

The State filed a petition for determinate sentencing alleging that J.B.L. committed aggravated robbery by threatening Coats with a deadly weapon while in the course of committing a theft. The grand jury certified the petition. J.B.L. pleaded true to the petition and elected to go to a jury for disposition. After a two-day trial, the jury assessed disposition at thirty years confinement.

Issue on Appeal

J.B.L. argues in one issue that the determinate sentencing statute, as applied in this case, violates the Due Process Clause of the Fifth Amendment of the United States Constitution by increasing his punishment without allowing him to present the enhancement to the jury for consideration beyond a reasonable doubt.

Standard of Review

When reviewing an attack upon the constitutionality of a statute, we presume the statute is valid and the legislature acted reasonably in enacting the statute. *Rodriquez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002). The individual challenging the statute bears the burden of proving it is unconstitutional. *Id.* We must uphold the statute if there is a reasonable construction that will render the statute constitutional and carry out the legislative intent. *Ex parte Flores*, 130 S.W.3d 100, 106 (Tex. App. – El Paso 2003, pet. ref'd).

Analysis

When a juvenile commits a felony, the juvenile court may impose either an indeterminate sentence or a determinate sentence. Section 54.04. If a juvenile commits an aggravated robbery, under an indeterminate sentence, he would spend at least one year confined in the Texas Youth Commission, and the Texas Youth Commission would be required to release him no later than his nineteenth birthday. Section 54.04(d)(2); TEX. HUM. RES. CODE ANN. § 61.084(c) (Vernon Supp. 2008).[4] However, when a juvenile is

---

[4] J.B.L. argues in his brief that he may be confined to the Texas Youth Commission until his twenty-first birthday; however, in 2007, the 80th legislature amended the statute for the Texas Youth Commission to terminate its control once the juvenile turns nineteen instead of twenty-one. This amended statute became effective June 8, 2007. J.B.L. was sentenced to

(Continued on following page)

charged with aggravated robbery, the State also has the option to file a petition for determinate sentencing with the grand jury. TEX. HUM. CODE ANN. § 53.045(a)(7) (Vernon 2008). If the grand jury certifies the petition for determinate sentencing, a jury may sentence the juvenile to commitment to the Texas Youth Commission with a possible transfer to the Texas Department of Criminal Justice for a term not to exceed forty years. Section 54.04(d)(3). The following steps must be taken in order for a court to impose a determinate sentence: (1) the State's petition must allege that the juvenile committed one of the crimes enumerated in TEX. FAM. CODE ANN. § 53.045(a) (Vernon 2008); (2) the State must refer the petition to the grand jury; (3) the grand jury must approve the petition by a vote of at least nine jurors; (4) the approval by the grand jury must be certified to the court; and (5) the certification must be entered in the record. TEX. FAM. CODE ANN. §§ 53.045, 54.04(d)(3) (Vernon 2008); *In re S.J.*, 977 S.W.2d 147, 149 (Tex. App. – San Antonio 1998, no pet.).

A juvenile who receives a determinate sentence is initially committed to the Texas Youth Commission's custody. Section 54.04(4)(3). However, when the juvenile turns sixteen but before he turns nineteen, the Texas Youth Commission may refer the juvenile to the

---

the Texas Youth Commission on June 13, 2007. *See* Act of June 8, 2007, 80th Leg., R.S., ch. 263, §§ 53, 78, 2007 Tex. Sess. Law Serv. 421, 449 (Vernon) (codified in TEX. HUM. RES. CODE ANN. § 61.084(e) (Vernon Supp. 2008)).

committing court for a transfer hearing. TEX. HUM. RES. CODE ANN. § 61.079(a) (Vernon Supp. 2008). At the transfer hearing, the committing court has the authority to (1) return the juvenile to the Texas Youth Commission with approval for the release of the juvenile under supervision, (2) return the juvenile to the Texas Youth Commission without the approval for the release of the juvenile under supervision, or (3) order the transfer of the juvenile to the custody of the Texas Department of Criminal Justice, Institutional Division. TEX. FAM. CODE ANN. § 54.11(i), (j) (Vernon 2008). An appeal may be taken from an order transferring the juvenile to the Texas Department of Criminal Justice, Institutional Division. TEX. FAM. CODE ANN. § 56.01(c)(2) (Vernon 2008). If the Texas Youth Commission does not refer the juvenile to the committing court for a transfer hearing before his nineteenth birthday, the Commission must either discharge the juvenile from its custody or transfer the juvenile to the Texas Department of Criminal Justice, Division of Pardons and Paroles, to serve out the juvenile's sentence on parole. TEX. HUM. RES. CODE ANN. § 61.084(e), (g) (Vernon Supp. 2008).

J.B.L. argues that his due process rights were violated because, rather than having a jury determine beyond a reasonable doubt whether his punishment should be increased from an indeterminate sentence to a determinate sentence, the grand jury certified the petition for determinate sentencing based upon probable cause. J.B.L. argues that the jury should have had an opportunity to consider an indeterminate

sentence. At the disposition hearing, the probation officer, Amechi Esekody, testified on direct examination that her recommendation was that J.B.L. be committed to the Texas Youth Commission for an indeterminate sentence. J.B.L. cross-examined Esekody as to why he would be a candidate for indeterminate sentencing.

> Q. Is it safe for this jury to conclude, then, that [J.B.L.]'s behaviors are more associated with child-like behaviors than adult behaviors and that's why you're recommending he go to the youth commission for an indeterminate time period? Can we draw that conclusion or not?
>
> A. It would be difficult to draw that conclusion based on the fact of his extensive record in the juvenile justice system.

On redirect, the State clarified with the witness that it was seeking a determinate sentence. J.B.L. objected to that line of questioning, stating that the jury should have the option of sentencing him to an indeterminate sentence as a lesser included type of sentence. The trial court overruled the objection. J.B.L. did not present an instruction for an indeterminate sentence in the charge.

The jury was instructed that, in order to assess a disposition, it must find that the juvenile is in need of rehabilitation or that the protection of the public requires disposition be made. The jury was charged that the disposition for aggravated robbery was commitment to the Texas Youth Commission, with a

possible transfer to the Texas Department of Criminal Justice, Institutional Division, or the Division of Pardons and Paroles for no more than forty years. The jury was instructed that, if it assessed the disposition for a term of not more than ten years, then it could place the juvenile on probation as an alternative to commitment to the Texas Youth Commission. The jury was also instructed that it could not have a disposition placing the juvenile on probation outside the juvenile's home unless it found beyond a reasonable doubt that the juvenile's home did not provide the quality of care and level of support and supervision that the juvenile needed to meet the conditions of probation.

The jury found beyond a reasonable doubt that J.B.L. was in need of rehabilitation or that the protection of the public required disposition be made. The jury assessed punishment at thirty years confinement and, therefore, did not consider probation for J.B.L.

On appeal, J.B.L. relies upon *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the appellant fired several .22 caliber bullets into the home of an African-American family that had moved into a previously all-white neighborhood. *Id.* at 469. Apprendi admitted to the shooting and stated that he did not want the family in the neighborhood because they were black. *Id.* He was charged with twenty-three different counts alleging shootings on four different dates and the unlawful possession of various weapons. *Id.* None of the counts referred to the hate

crime statute or that Apprendi acted for a racially biased purpose. Apprendi entered into a plea bargain agreement in which he pleaded guilty to two counts of second degree possession of a firearm for an unlawful purpose and one count of the third degree offense of unlawful possession of an antipersonnel bomb. *Id.* at 469-70. The State agreed to drop the remaining twenty counts. The State reserved the right to request that the court impose an enhanced sentence on the ground that the offense was committed with a biased purpose, and Apprendi reserved the right to appeal the constitutionality of the hate crime statute. *Id.* at 470.

After Apprendi pleaded guilty, the State moved to enhance the sentence under New Jersey's hate crime statute. *Id.* The trial court found by a preponderance of the evidence that Apprendi's purpose in committing the crime was to intimidate the victim and that the crime was motivated by racial bias. *Id.* at 471. The trial court sentenced Apprendi to twelve years confinement for one of the possession of firearm counts and to shorter concurrent sentences on the other counts. *Id.*

The United States Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The high court went on to say that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the

prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Id.*

Apprendi is distinguishable from the case before us in a number of ways. In *Apprendi*, the issue was that a factual determination authorizing an increase in punishment was not made by a jury on the basis of proof beyond a reasonable doubt. *Id.* at 469. Also in *Apprendi*, the appellant pleaded guilty to possession of a firearm for an unlawful purpose and unlawful possession of a prohibited weapon. However, there was no mention of the hate crime statute in the charging instrument. After Apprendi pleaded guilty, the State sought to increase the punishment by filing a motion to enhance the sentence under the hate crime statute. Here, there are no facts that change the range of punishment. Rather, once the State decided to file a petition for determinate sentencing, the range of punishment was set. There was not an enhancement in punishment. The range of punishment did not increase based on any facts that were not presented to the jury. All the facts were presented to the jury when it decided J.B.I.'s disposition.

J.B.L. also argues that the determinate sentencing statute increases the stigma associated with his activity by changing the consequences of such criminal activity from a confidential, privileged period of juvenile supervision to a first degree felony conviction on J.B.L.'s public adult record. The Due Process Clause of the Fifth Amendment of the United States

Constitution requires that any fact that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt, *Jones v. United States*, 526 U.S. 227, 243 (1999). This case met all of those requirements. The petition for determinate sentencing acts as an indictment. Section 53.045(d); *In re R.L.H.*, 771 S.W.2d 697, 699 (Tex. App. – Austin 1989, writ den'd). A petition, acting as an indictment, was presented to the grand jury, all the facts were submitted to the jury, and all the facts were proven beyond a reasonable doubt.

Whether J.B.L. will serve any time in the Texas Department of Criminal Justice, Institutional Division, hinges on the required transfer hearing. J.B.L. has not been transferred to the Texas Department of Criminal Justice, Institutional Division, and the required referral for a transfer hearing has not been made to the committing court. If the committing court does issue an order transferring J.B.L. to the Texas Department of Criminal Justice, Institutional Division, then he may appeal that order. However, because J.B.L. may not serve any time in the Texas Department of Criminal Justice, Institutional Division, his claims are not ripe for review. An opinion on J.B.L.'s due process claims at this time would be wholly advisory. *In re S.B.C.*, 805 S.W.2d 1, 5 (Tex. App. – Tyler 1991, writ den'd). This court has no authority to render advisory opinions. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998);

City of Garland v. Louton, 691 S.W.2d 603, 605 (Tex. 1985). J.B.L.'s issue on appeal is overruled.

Conclusion

We affirm the judgment of the trial court.

RICK STRANGE

JUSTICE

March 5, 2009

Panel consists of: Wright, C.J.,
McCall, J., and Strange, J.

CAUSE NO. 07-01-00980-JV

IN THE MATTER OF	**IN THE JUVENILE**
JBL	**COURT OF**
JUVENILE-RESPONDENT	**MONTGOMERY COUNTY, TEXAS**

DISPOSITIONAL ORDER OF COMMITMENT TO THE TEXAS YOUTH COMMISSION

(Filed June 13, 2007)

On this day, in the Juvenile Court of Montgomery County, Texas, there was called a hearing for consideration of the matters in the above styled and numbered cause, wherein by proper petition, **JBL**, Juvenile-Respondent, is alleged to have engaged in Delinquent Conduct. After due notice had been served on all parties, as required by law, came and appeared before the Court, Petitioner, by its prosecuting attorney, Carolyn Atkinson, Juvenile-Respondent, **JBL**, represented by Jay Wright, attorney, and Pauline Lindsey and Jason Barnes Gaskin, parent(s)/ guardian(s) of Juvenile-Respondent. All parties announced ready.

Juvenile-Respondent was found to have engaged in delinquent conduct in a hearing held by the Court on the **11th Day of June, 2007**. In that hearing, the Court found that Juvenile-Respondent had committed the offense(s) of **Aggravated Robbery-First Degree Felony**.

After hearing the pleadings of all parties and after hearing the evidence and argument of counsel, found beyond a reasonable doubt that the following allegations are true and supported by the evidence:

> **Aggravated Robbery-First Degree Felony – 29.03PC:** On or about January 15, 2007, in Montgomery County, Texas, JBL, Juvenile-Respondent, while in the course of committing theft and with intent to obtain or maintain control of property, did then and there intentionally or knowingly threaten or place another, namely, Colleen Coats, in fear of imminent bodily injury or death, by threatening Colleen Coats with a deadly weapon, namely, a firearm.
>
> The Court finds that said child was born on the **7th Day of May, 1990** and is **17** years of age. The Court finds **Pauline Lindsey and Jason Barnes Gaskin** responsible for supporting **JBL**. The Court finds that the child is in need of rehabilitation and requires that disposition be made.

The Court further finds that it is in Juvenile-Respondent's best interests to be placed outside of his/her home; that reasonable efforts were made to prevent or eliminate the need for Juvenile-Respondent's removal from the home and to make it possible for Juvenile-Respondent to return to his/her home; and that Juvenile-Respondent, in his/her home, cannot be provided the quality of care and level of support and supervision that he/she needs to meet the conditions of probation.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that **JBL** is hereby committed to the Texas Youth Commission for a **thirty (30) year determinate sentence** with possible transfer to the Texas Department of Criminal Justice Institutional Division pursuant to §53.045 of the Texas Family Code. The disposition ordered addresses Juvenile-Respondent's education needs. **JBL**, Juvenile-Respondent was taken into custody on **January 15, 2007** and has been held in the Montgomery County Juvenile Detention Facility since that date. Juvenile-Respondent is ordered placed into the custody of the Montgomery County Juvenile Probation Department pending transportation to the proper Texas Youth Commission Facility on this the 13th day of June, 2007.

SIGNED AND ENTERED THE 13 DAY OF JUNE, 2007.

/s/ Dennis Watson
JUDGE PRESIDING

CAUSE NO. 07-01-00980-JV

IN THE MATTER OF	**IN THE JUVENILE**
JBL	**COURT OF**
	MONTGOMERY COUNTY, TEXAS

DISPOSITIONAL ORDER OF TRANSFER TO THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE

(Filed May 1, 2009)

On the 1st day of May, came to be heard the above-numbered and entitled cause pursuant to Section 54.11 of the Texas Family Code, on the issue of release from the Texas Youth Commission or transfer to the Institutional Division of the Texas Department of Criminal Justice of Juvenile-Respondent, JBL, whose date of birth is May 7, 1990.

On June 13, 2007, Juvenile-Respondent, JBL, was found to have engaged in delinquent conduct, namely, Aggravated Robbery, committed on January 15, 2007. A disposition hearing was held and Juvenile-Respondent was committed to the Texas Youth Commission under a determinate sentence in accordance with Chapter 61 and Chapter 61.084(c), Texas Human Resources Code, and Sections 53.045 and 54.04 of the Texas Family Code. Juvenile-Respondent was sentenced by the Court to thirty years confinement.

After due notice had been issued to all parties as required by law, Juvenile-Respondent, JBL, appeared in person and by Attorney, Darrin Ray. Also appearing was a representative of the Texas Youth Commission, Leonard Cuccolo. All parties announced ready.

After hearing the pleadings of all parties and considering the evidence and argument of counsel, the recommendations of the Texas Youth Commission, and other factors pursuant to and in full accordance with Sections 54.11(d) and (k), Texas Family Code, the Court hereby orders that Juvenile-Respondent, JBL, be transferred to the custody of the institutional division of the Texas Department of Criminal Justice for the completion of juvenile-respondent's sentence.

SIGNED AND ENTERED THIS THE ___ DAY OF 5/1 2009.

/s/ Mary Ann Turner
JUDGE PRESIDING

[Fingerprint Omitted In Printing]

THE SUPREME COURT OF TEXAS
[SEAL] **Judicial Directory**

Case # 09-0445 -> Event: Petition for Review disposed CaseMail

Event Information:

Event Type: Petition for Review disposed

Description: Indicates filing re Petition for Review

Date: 10/23/2009

Disposition: proceeding denied

Opinion Written:

FAM. 53.045
FAMILY CODE – TITLE 3. JUVENILE JUSTICE CODE

§ 53.045. VIOLENT OR HABITUAL OFFENDERS.

(a) Except as provided by Subsection (e), the prosecuting attorney may refer the petition to the grand jury of the county in which the court in which the petition is filed presides if the petition alleges that the child engaged in delinquent conduct that constitutes habitual felony conduct as described by Section 51.031 or that included the violation of any of the following provisions:

(1) Section 19.02, Penal Code (murder);

(2) Section 19.03, Penal Code (capital murder);

(3) Section 19.04, Penal Code (manslaughter);

(4) Section 20.04, Penal Code (aggravated kidnapping);

(5) Section 22.011, Penal Code (sexual assault) or Section 22.021, Penal Code (aggravated sexual assault);

(6) Section 22.02, Penal Code (aggravated assault);

(7) Section 29.03, Penal Code (aggravated robbery);

(8) Section 22.04, Penal Code (injury to a child, elderly individual, or disabled individual), if the

offense is punishable as a felony, other than a state jail felony;

(9) Section 22.05(b), Penal Code (felony deadly conduct involving discharging a firearm);

(10) Subchapter D, Chapter 481, Health and Safety Code, if the conduct constitutes a felony of the first degree or an aggravated controlled substance felony (certain offenses involving controlled substances);

(11) Section 15.03, Penal Code (criminal solicitation);

(12) Section 21.11(a)(1), Penal Code (indecency with a child);

(13) Section 15.031, Penal Code (criminal solicitation of a minor);

(14) Section 15.01, Penal Code (criminal attempt), if the offense attempted was an offense under Section 19.02, Penal Code (murder), or Section 19.03, Penal Code (capital murder), or an offense listed by Section 3g(a)(1), Article 42.12, Code of Criminal Procedure;

(15) Section 28.02, Penal Code (arson), if bodily injury or death is suffered by any person by reason of the commission of the conduct; or

(16) Section 49.08, Penal Code (intoxication manslaughter); or

(17) Section 15.02, Penal Code (criminal conspiracy), if the offense made the subject of the criminal conspiracy includes a violation of any of the provisions referenced in Subdivisions (1) through (16).

(b) A grand jury may approve a petition submitted to it under this section by a vote of nine members of the grand jury in the same manner that the grand jury votes on the presentment of an indictment.

(c) The grand jury has all the powers to investigate the facts and circumstances relating to a petition submitted under this section as it has to investigate other criminal activity but may not issue an indictment unless the child is transferred to a criminal court as provided by Section 54.02 of this code.

(d) If the grand jury approves of the petition, the fact of approval shall be certified to the juvenile court, and the certification shall be entered in the record of the case. For the purpose of the transfer of a child to the Texas Department of Corrections as provided by Section 61.084(c), Human Resources Code, a juvenile court petition approved by a grand jury under this section is an indictment presented by the grand jury.

(e) The prosecuting attorney may not refer a petition that alleges the child engaged in conduct that violated Section 22.011(a)(2), Penal Code, or Sections 22.021(a)(1)(B) and (2)(B), Penal Code, unless the

child is more than three years older than the victim of the conduct.

---

§ 54.04. DISPOSITION HEARING.

(a) The disposition hearing shall be separate, distinct, and subsequent to the adjudication hearing. There is no right to a jury at the disposition hearing unless the child is in jeopardy of a determinate sentence under Subsection (d)(3) or (m), in which case, the child is entitled to a jury of 12 persons to determine the sentence.

(b) At the disposition hearing, the juvenile court, notwithstanding the Texas Rules of Evidence or Chapter 37, Code of Criminal Procedure, may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses. Prior to the disposition hearing, the court shall provide the attorney for the child with access to all written matter to be considered in disposition. The court may order counsel not to reveal items to the child or the child's parent, guardian, or guardian ad litem if such disclosure would materially harm the treatment and rehabilitation of the child or would substantially decrease the likelihood of receiving information from the same or similar sources in the future.

(c) No disposition may be made under this section unless the child is in need of rehabilitation or

the protection of the public or the child requires that disposition be made. If the court or jury does not so find, the court shall dismiss the child and enter a final judgment without any disposition. No disposition placing the child on probation outside the child's home may be made under this section unless the court or jury finds that the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of the probation.

(d) If the court or jury makes the finding specified in Subsection (c) allowing the court to make a disposition in the case:

(1) the court or jury may, in addition to any order required or authorized under Section 54.041 or 54.042, place the child on probation on such reasonable and lawful terms as the court may determine:

(A) in the child's own home or in the custody of a relative or other fit person; or

(B) subject to the finding under Subsection (c) on the placement of the child outside the child's home, in:

(i) a suitable foster home; or

(ii) a suitable public or private residential treatment facility licensed by a state governmental entity or exempted from licensure by state law, except a facility operated by the Texas Youth Commission; or

(iii) a suitable public or private post-adjudication secure correctional facility that meets the requirements of Section 51.125, except a facility operated by the Texas Youth Commission;

(2) if the court or jury found at the conclusion of the adjudication hearing that the child engaged in delinquent conduct that violates a penal law of this state or the United States of the grade of felony and if the petition was not approved by the grand jury under Section 53.045, the court may commit the child to the Texas Youth Commission without a determinate sentence;

(3) if the court or jury found at the conclusion of the adjudication hearing that the child engaged in delinquent conduct that included a violation of a penal law listed in Section 53.045(a) and if the petition was approved by the grand jury under Section 53.045, the court or jury may sentence the child to commitment in the Texas Youth Commission with a possible transfer to the institutional division or the pardons and paroles division of the Texas Department of Criminal Justice for a term of:

(A) not more than 40 years if the conduct constitutes:

(i) a capital felony;

(ii) a felony of the first degree; or

(iii) an aggravated controlled substance felony;

(B) not more than 20 years if the conduct constitutes a felony of the second degree; or

(C) not more than 10 years if the conduct constitutes a felony of the third degree;

(4) the court may assign the child an appropriate sanction level and sanctions as provided by the assignment guidelines in Section 59.003; or

(5) if applicable, the court or jury may make a disposition under Subsection (m).

(e) The Texas Youth Commission shall accept a person properly committed to it by a juvenile court even though the person may be 17 years of age or older at the time of commitment.

(f) The court shall state specifically in the order its reasons for the disposition and shall furnish a copy of the order to the child. If the child is placed on probation, the terms of probation shall be written in the order.

(g) If the court orders a disposition under Subsection (d)(3) or (m) and there is an affirmative finding that the defendant used or exhibited a deadly weapon during the commission of the conduct or during immediate flight from commission of the conduct, the court shall enter the finding in the order. If there is an affirmative finding that the deadly weapon was a firearm, the court shall enter that finding in the order.

(h) At the conclusion of the dispositional hearing, the court shall inform the child of:

(1) the child's right to appeal, as required by Section 56.01; and

(2) the procedures for the sealing of the child's records under Section 58.003.

(i) If the court places the child on probation outside the child's home or commits the child to the Texas Youth Commission, the court:

(1) shall include in its order its determination that:

(A) it is in the child's best interests to be placed outside the child's home;

(B) reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for the child to return to the child's home; and

(C) the child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation; and

(2) may approve an administrative body to conduct permanency hearings pursuant to 42 U.S.C. Section 675 if required during the placement or commitment of the child.

(j) If the court or jury found that the child engaged in delinquent conduct that included a

violation of a penal law of the grade of felony or jailable misdemeanor, the court:

(1) shall require that the child's thumbprint be affixed to the order; and

(2) may require that a photograph of the child be attached to the order.

(k) Except as provided by Subsection (m), the period to which a court or jury may sentence a person to commitment to the Texas Youth Commission with a transfer to the Texas Department of Criminal Justice under Subsection (d)(3) applies without regard to whether the person has previously been adjudicated as having engaged in delinquent conduct.

(l) Except as provided by Subsection (q), a court or jury may place a child on probation under Subsection (d)(1) for any period, except that probation may not continue on or after the child's 18th birthday. Except as provided by Subsection (q), the court may, before the period of probation ends, extend the probation for any period, except that the probation may not extend to or after the child's 18th birthday.

(m) The court or jury may sentence a child adjudicated for habitual felony conduct as described by Section 51.031 to a term prescribed by Subsection (d)(3) and applicable to the conduct adjudicated in the pending case if:

(1) a petition was filed and approved by a grand jury under Section 53.045 alleging that the child engaged in habitual felony conduct; and

(2) the court or jury finds beyond a reasonable doubt that the allegation described by Subdivision (1) in the grand jury petition is true.

(n) A court may order a disposition of secure confinement of a status offender adjudicated for violating a valid court order only if:

(1) before the order is issued, the child received the full due process rights guaranteed by the Constitution of the United States or the Texas Constitution; and

(2) the juvenile probation department in a report authorized by Subsection (b):

(A) reviewed the behavior of the child and the circumstances under which the child was brought before the court;

(B) determined the reasons for the behavior that caused the child to be brought before the court; and

(C) determined that all dispositions, including treatment, other than placement in a secure detention facility or secure correctional facility, have been exhausted or are clearly inappropriate.

(o) In a disposition under this title:

(1) a status offender may not, under any circumstances, be committed to the Texas Youth Commission for engaging in conduct that would not, under state or local law, be a crime if committed by an adult;

(2) a status offender may not, under any circumstances other than as provided under Subsection (n), be placed in a post-adjudication secure correctional facility; and

(3) a child adjudicated for contempt of a county, justice, or municipal court order may not, under any circumstances, be placed in a post-adjudication secure correctional facility or committed to the Texas Youth Commission for that conduct.

(p) Except as provided by Subsection (l), a court that places a child on probation under Subsection (d)(1) for conduct described by Section 54.0405(b) and punishable as a felony shall specify a minimum probation period of two years.

(q) If a court or jury sentences a child to commitment in the Texas Youth Commission under Subsection (d)(3) for a term of not more than 10 years, the court or jury may place the child on probation under Subsection (d)(1) as an alternative to making the disposition under Subsection (d)(3). The court shall prescribe the period of probation ordered under this subsection for a term of not more than 10 years. The court may, before the sentence of probation expires, extend the probationary period under Section 54.05, except that the sentence of probation and any extension may not exceed 10 years. The court may, before the child's 18th birthday, discharge the child from the sentence of probation. If a sentence of probation ordered under this subsection and any extension of probation ordered under Section 54.05

will continue after the child's 18th birthday, the court shall discharge the child from the sentence of probation on the child's 18th birthday unless the court transfers the child to an appropriate district court under Section 54.051.

(r) If the judge orders a disposition under this section and there is an affirmative finding that the victim or intended victim was younger than 17 years of age at the time of the conduct, the judge shall enter the finding in the order.

(s) Repealed by Acts 2007, 80th Leg., R.S., Ch. 263, § 64(1), eff. June 8, 2007.

(t) Repealed by Acts 2007, 80th Leg., R.S., Ch. 263, § 64(1), eff. June 8, 2007.

(u) For the purposes of disposition under Subsection (d)(2), delinquent conduct that violates a penal law of this state of the grade of felony does not include conduct that violates a lawful order of a county, municipal, justice, or juvenile court under circumstances that would constitute contempt of that court.

Text of subsection as added by Acts 2007, 80th Leg., R.S., Ch. 849, Sec. 3

(v) If the judge orders a disposition under this section for delinquent conduct based on a violation of an offense, on the motion of the attorney representing the state the judge shall make an affirmative finding of fact and enter the affirmative finding in the papers in the case if the judge determines that, regardless of

whether the conduct at issue is the subject of the prosecution or part of the same criminal episode as the conduct that is the subject of the prosecution, a victim in the trial:

(1) is or has been a victim of a severe form of trafficking in persons, as defined by 22 U.S.C. Section 7102(8); or

(2) has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described by 8 U.S.C. Section 1101(a)(15)(U)(iii).

Text of subsection as added by Acts 2007, 80th Leg., R.S., Ch. 908, Sec. 11

(v) A child may be detained in an appropriate detention facility following disposition of the child's case under Subsection (d) or (m) pending:

(1) transportation of the child to the ordered placement; and

(2) the provision of medical or other health care services for the child that may be advisable before transportation, including health care services for children in the late term of pregnancy.

(w) That part of the papers in the case containing an affirmative finding under Subsection (v):

(1) must include specific information identifying the victim, as available;

(2) may not include information identifying the victim's location; and

(3) is confidential, unless written consent for the release of the affirmative finding is obtained from the victim or, if the victim is younger than 18 years of age, the victim's parent or guardian.

CAUSE NO. 07-01-00890-JV

IN THE MATTER OF	**IN THE JUVENILE COURT**
JBL	**OF**
JUVENILE-RESPONDENT	**MONTGOMERY COUNTY, TEXAS**

JURY CHARGE

LADIES AND GENTLEMEN OF THE JURY:

The Juvenile Respondent, JBL, stands charged by petition with the offense of Aggravated Robbery, alleged to have been committed by him on or about January 15, 2007.

To this charge the Juvenile Respondent has entered a plea of true. He has persisted in entering his plea of true notwithstanding that the court, as required by law, has admonished him of the consequences. It plainly appearing to the court that the Juvenile Respondent is mentally competent, and that he makes this plea freely and voluntarily, his plea is accepted by the court. You are instructed to find that the Juvenile Respondent engaged in delinquent conduct as charged in the petition, and assess the Juvenile Respondent's disposition in accordance with the instructions set out below.

I.

You are instructed that the disposition for Aggravated Robbery, is commitment in the Texas Youth Commission with a possible transfer to the institutional division or the pardons and paroles division of the Texas Department of Criminal Justice for a term of not more than forty (40) years.

Therefore, you will assess the disposition for the Juvenile Respondent at any term of years not more than forty (40) years.

II.

You are instructed that if you sentence the Juvenile Respondent to commitment in the Texas Youth Commission for a term of not more than ten (10) years, you may place the Juvenile Respondent on probation as an alternative to commitment in the Texas Youth Commission. The court shall prescribe the period of probation for a term of not more than ten (10) years.

III.

You are instructed that no disposition placing the Juvenile Respondent on probation outside the Juvenile Respondent's home may be made under this code unless you find beyond a reasonable doubt that the Juvenile Respondent in the Juvenile Respondent's home cannot be provided the quality of care and level

or support and supervision that the Juvenile Respondent needs to meet the conditions of probation.

IV.

The law requires that in order for disposition to be made in this case that you must find that the Juvenile Respondent is in need of rehabilitation or the protection of the public or the Juvenile Respondent requires that disposition be made.

V.

You are instructed that if you find that there is evidence in this case in regard to the Juvenile Respondent's having participated in any crime or bad act other than the offense for which you have found him true, you cannot consider such crime(s) or bad act(s) unless it has been shown beyond a reasonable doubt by the evidence to have been committed by the Juvenile Respondent or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime(s) or act(s). You are further instructed such crime(s) or act(s) are not to be used in setting the disposition of the Juvenile Respondent, but rather to assist you in determining the proper disposition in this particular case alone.

It is not required that the prosecution prove the Juvenile-Respondent committed other crimes or bad acts beyond all possible doubt; it is required that the

prosecution's proof excludes all "reasonable doubt" concerning whether the Juvenile-Respondent engaged in delinquent conduct.

VI.

You are further instructed that in fixing the Juvenile Respondent's disposition, which you will show in your verdict, you may take into consideration all the facts shown by the evidence admitted before you in the full trial of this case and the law as submitted to you in this charge.

VII.

Your verdict must be by a unanimous vote of all members of the jury. In arriving at your verdict, it will not be proper to fix the same by lot, chance, or any other method other than by a full, fair and free exercise of the opinion of the individual jurors under the evidence admitted before you.

During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

No one has any authority to communicate with you except the officer who has you in charge. After you have retired, you may communicate with this Court in writing through this officer. Any communication

relative to the cause must be written, prepared and signed by the Foreman and shall be submitted to the Court through this officer. Do not attempt to talk to the officer who has you in charge, or the attorneys, or the Court, or anyone else concerning any questions you may have.

VIII.

When you have answered the following jury questions that you are required to answer under the instructions of the judge, and your presiding juror has placed your answer in the space provided and signed the verdict as presiding juror, then you will return into court with your verdict.

/s/ Dennis Watson
Judge Presiding

CAUSE NO. 07-01-00890-JV

IN THE MATTER OF	§	**IN THE**
	§	**JUVENILE COURT**
JBL	§	**OF**
	§	
	§	**MONTGOMERY**
JUVENILE-RESPONDENT	§	**COUNTY, TEXAS**

VERDICT OF THE JURY

Do you find beyond a reasonable doubt that JBL is in need of rehabilitation or the protection of the public or the child requires that disposition be made?

Answer: YES or NO

Answer: Yes

We, the Jury, having found the Juvenile Respondent, JBL, engaged in delinquent conduct by committing the offense of Aggravated Robbery, as charged in the petition, assess disposition at 30 years.

If you assessed disposition for a term of not more than ten (10) years, do you hereby place the [sic] JBL on probation for a period to be prescribed by the court?

Answer: YES or NO

Answer: _____

If you answered yes to the above question do you find beyond a reasonable doubt that JBL, in the [sic] JBL'S home, cannot be provided the quality of care

and level of support and supervision that JBL needs to meet the conditions of probation?

Answer: YES or NO

Answer: _____

/s/ Steve Samford
Presiding Juror

CAUSE NO. 07-01-00890-JV

IN THE MATTER OF	§	**IN THE**
	§	**JUVENILE COURT**
JBL	§	
	§	**OF**
	§	**MONTGOMERY**
JUVENILE-RESPONDENT	§	**COUNTY, TEXAS**

GRAND JURY APPROVAL OF JUVENILE COURT PETITION

(Filed Apr. 17, 2007)

The GRAND JURY, for the County of Montgomery, State of Texas, duly sworn, charges and organized as such at the **April-June Term of the 9th District Court** for the County of Montgomery, upon their oaths, as authorized by §53.045 of the Texas Juvenile Justice Code, do present to said Court as said Term that, by a vote of at least nine of its members, it finds probable cause to believe that **JBL**, Juvenile-Respondent, has engaged in Delinquent Conduct by committing the offense of **Aggravated Robbert** [sic]-**First Degree Felony** as alleged in the Juvenile Petition previously filed in Cause Number **07-01-00890-JV** in the Juvenile Court of Montgomery County, Texas, which was referred to the Grand Jury

and considered by it, and that it approves of the Juvenile Petition.

/s/ Janie Meador
FOREMAN OF THE
GRAND JURY